United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1166

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To Be Argued By
DAVID A. PRAVDA

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

-against-

DAVID RODRIQUEZ,

Defendant-Appellant.

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APPELLANT DAVID RODRIQUEZ' BRIEF

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DAVID A. PRAVDA
Attorney for Defendant-Appellant
Office & P.O. Address
10 East 40th Street
New York, New York
(212) 686-4300

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Docket No: 76-1166

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INTRODUCTORY STATEMENT

The defendant-appellant, DAVID RODRIGUEZ, appeals from a judgment of the United States District Court for the Southern District of New York, rendered on March 29, 1976, convicting the appellant, after a trial before District

Judge Constance Baker Motley and a jury, of one count of unlawfully possessing a firearm not registered to appellant in the National Firearms Registration and Transfer Record [26 U.S.C. §5861(d)], and one count of unlawfully transfering a firearm in that appellant failed to file the appropriate transfer application [26 U.S.C. §5861(e)].

The appellant was sentenced as a Youthful Offender, pursuant to 18 U.S.C. §5010(a), to a suspended sentence and a two year period of probation; the probationary period to commence upon appellant's release from incarceration by the state of New York on unrelated charges.

The appellant had been charged with three others in a four count information alleging one count of conspiracy to violate the federal gun control laws [18 U.S.C. §371], one count of being engaged in the business of dealing in firearms and amunition without the proper federal license therefor [18 U.S.C. §922(a)(1)] and the two Title 26 counts recited above. The appellant was acquitted by the jury of the two Title 18 counts, the conspiracy charge and the substantive gun dealing charge, but was convicted of the two Title 26 counts, the unlawful possession and the unlawful transfer of a firearm, which convictions are here under appeal. Two of appellant's co-defendants were acquitted of all charges against them and one of appellant's co-defendants was ac-

quitted of the conspiracy and gun dealing charges and convicted of the same Title 26 counts as appellant herein.

QUESTIONS PRESENTED

1. Did the Trial Court below commit error by failing to charge the jury, as requested by the appellant, that the Government had the burden of proving that the weapon in the case was a "firearm" within the statutory definition of that term, including the burden of negating that the "firearm" was an "antique firearm" within the statutory definition?

2. Did the Government commit error by arguing to the jury that the defendants below should have and would have come forward with evidence that they were not guilty if such evidence existed, in violation of the appellant's constitutional right to make no defense whatsoever and to put the Government to the entire burden of proof on all issues?

Appellant urges this Court to answer each question in the affirmative.

FACTS OF THE CASE

The facts of this case are relatively simple. A Government undercover agent purchased various weapons from

defendants below. Insofar as is relevant to this appeal, the appellant's defense was to the effect that the weapon, introduced by the Government as Government's Exhibit "2A", (hereinafter GX2A) was not a "firearm."

STATUTORY BACKGROUND

The charge against the appellant is that he possessed a firearm not registered to him in the National Firearms Negistration and Transfer Record [26 U.S.C. §5861(d)] and that he transferred a firearm in violation of the provisions of Title 26, United States Code §5812 [26 U.S.C. §5861(e)]. Both of the statutes which it is claimed the appellant violated require that the weapon in question be a "firearm."

The term "firearm" is used as a term of art, rather than having its ordinary usage. "Firearm" is defined in 26 U.S.C. §5845(a). Eight separate weapons are defined as being included within the term "firearm," and it is then specifically stated that:

> The term "firearm" shall not include an antique firearm. . . .[26 U.S.C. §5845(a)].

The term "antique firearm" is thereafter itself defined in 26 U.S.C. §5845(g). For the purposes of this case, the only aspect of the "antique firearm" definition that is

relevant is whether or not GX2A was manufactured in or before 1898.

The Government contended that GX2A was a firearm under the definition found in 26 U.S.C.§5845(a)(1) in that it was a shotgun having a barrel of less than 18 inches in length.

The term "shotgun" is likewise thereafter defined in the statute at 26 U.S.C.§5845(d).

Thus, for the defendant to be guilty as charged on the Title 26 violations, the Government was required to prove, in addition to any other elements of the crime, that GX2A is a "firearm" within the meaning of 26 U.S.C. §5845.

ARGUMENT

POINT I

THE COURT BELOW COMITTED REVERSIBLE ERROR BY FAILING TO GIVE THE REQUESTED CHARGE REGARDING THE "ANTIQUE FIREARMS" EXCEPTION TO THE STATUTE.

If GX2A was manufacturered in or before 1898, then GX2A is not a "firearm" and the conviction cannot stand. The appellant requested that the Court include in its charge to the jury the "antique firearm" exception to the statute (30a-39a)*.

* Page numbers in parenthesis followed by a lower case "a" refer to the pages of appellant's appendix. The appellant's appendix is paginated at the bottom center of each page with the page number followed by a lower case "a".

As a general rule it may be stated that a Trial Court must instruct the jury on the substance of a defendant's request if the requested instruction correctly states the law and advances any theory upon which the defendant may be acquitted. In Strauss v. United States, 376 F.2d 416 (1967) the Fifth Circuit stated, at 419:

> "It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence" Perez v. United States, 5 Cir. 1961, 297 F.2d 12, 13-14 [emphasis added (by the Court)]. We find no requirement that a requested charge encompass, in the trial judge's eyes, a believable or sensible defense...We hold that where the defendant's proposed charge presents, when properly framed, a valid defense, and where there has been some evidence relevant to that defense adduced at trial, then the trial judge may not refuse to charge on that defense.

In the instant case, it is suggested, as shown hereinafter, that there was some relevant evidence, even if circumstantial, adduced at trial, which would have warranted granting the requested instruction.

While there is a respected line of cases standing for the proposition that the Government need not negate all statutory exceptions or exemptions in sustaining a criminal prosecution, McKelvey v. United States, 260 U.S. 353 (1922), United States v. Messina, 481 F.2d 878, 880 (2d Cir., 1973), and United States v. Rowlette, 397 F.2d 475, 479 (7th Cir.,

1968), it is urged upon this Court that that line of decisional law can be distinquished from the issue at bar.

In most of the reported cases dealing with exceptions and exemptions to a criminal statute, the exception or exemption relates directly to the personal status of the defendant himself, as for example, the statutory exemption with regard to certain drug offenses if the defendant is a pharmacist.

The rationale for placing the burden upon the defendant with regard to an exemption relating to the defendant's own personal status is clear in that the defendant himself would be the party in the best position to be aware of his personal status and would be in the best position to establish that status. Thus, the general rule has a rational basis.

In the instant case, it is respectfully submitted that there is no rational basis for putting an affirmative burden upon appellant. The exception in the "firearm" definition for the "antique firearm" does not relate to the personal status of the defendant, but rather relates to the status of an instrumentality in the possession, custody and control of the Government. It is therefore, not unreasonable to expect the Government to negate the statutory exception.

The mere possession of the weapon which was GX2A is not

criminal conduct under the Federal law unless GX2A was a "firearm." In order to met its burden of proof, the Government must prove, beyond a reasonable doubt, that GX2A was a "firearm." To do so includes the negating of the clear exception created in the statute.

The weapon was exhibited before the jury for several days throughout the entire trial; and during the cross-examination of Gunnar Erickson, the Government's firearms expert witness, GX2A was literally taken apart, each part exhibited to the jury and put back together again (13a-16a). Under these circumstances, it is argued to this Court that the physical presentation of GX2A to the jury was circumstantial evidence as to the age of the weapon; therefore, the appellant was entitled to the requested charge.

It should be specifically noted that in a somewhat similar case a conviction under Title 26 was reversed because the Government failed to prove that the firearm in question had been "made in the United States." The Government had specifically argued that the burden was on the defendant to establish the negative that the firearm was not made in the United States. The Court rejected the Government's argument, stating that the burden was upon the Government to prove that the firearm was made in the United States. United States v. Goodson, 439 F.2d 1056(5th Cir., 1971).

In a similar vein is Gott v. United States, 432 F.2d 45 (9th Cir., 1970) where it was held that the Government's failure to prove when a firearm was made was a fatal defect to a prosecution under 26 U.S.C. §5861(c).

It is conceded that where the evidence of the exempting fact is not reasonably obtainable by the prosecution, but lies especially within the control of the defendant, or particularly within the defendant's knowledge, the prosecution should be excused from the burden of a negative averment as part of the Government's case [see for example, United States v. Bianco, 534 F.2d 501 (2d Cir., 1976)]; however, where as here, the excepting fact is clearly and openly available to proof by the Government, and with the very instrumentality in the possession of the Government, the burden of the negative averment should rest squarely upon the Government.

POINT II

THE PROSECUTOR COMMITTED REVERSIBLE ERROR IN THE GOVERNMENT'S SUMMATION.

The Government's summation contained the suggestion (41a-42a) that if any of the defendants had a registration certificate, that defendant would "... bring it in. That

would be the clearest, most obvious proof that their defendants are not guilty..." (41a).

It is respectfully urged upon this Court that the Government's summation had the improper effect of inferentially commenting on the failure of appellant to present any defense and improperly attempted to shift the burden of proof to appellant on an essential element of the crime charged.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INFORMATION REMANDED FOR A NEW TRIAL IN THE DISTRICT COURT.

Respectfully submitted,

DAVID A. PRAVDA
Attorney for Defendant-Appellant
Office & P.O. Address
10 East 40th Street
New York, New York 10016

(212) 686-4300